

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID J. HERNANDEZ,

Defendant.

8:09CR27

MEMORANDUM AND ORDER

This matter is before the Court on the Defendant's Notice of Appeal (Filing No. 159), the Defendant's motion for leave to proceed in forma pauperis on appeal (Filing No. 161),¹ and the Clerk's memorandum regarding in forma pauperis status (Filing No. 160). A motion for a certificate of appealability was not filed. The Defendant appeals from the Order (Filing No. 158) denying his "Motion for Relief from § 2255 Judgment" (Filing No. 157), construed as a successive motion under 28 U.S.C. § 2255. The Notice of Appeal will be also considered as a request for a certificate for appealability.

Before the Defendant may appeal the denial of his § 2255 motion, a "Certificate of Appealability" must issue. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), the right to appeal the denial of a § 2255 motion is governed by the certificate of appealability requirements of 28 U.S.C. § 2253(c). 28 U.S.C. § 2253(c)(2) provides that a certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

¹ A trust account statement was also filed. (Filing No. 162.)

....

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c).

A “substantial showing of the denial of a constitutional right” requires a demonstration “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were “adequate to deserve encouragement to proceed further.””⁴ Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 & n.4 (1983)).

The issues raised in the motion requesting reconsideration of the denial of the § 2255 motion were carefully considered. For the reasons set forth in the Court’s previously issued Memorandum and Order denying the Defendant’s motion, the Court concludes that the Defendant has not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c).

IT IS ORDERED:

1. The Defendant's request for a certificate of appealability is denied;
2. The Defendant’s motion for leave to proceed in forma pauperis on appeal (Filing No. 161) is denied; and

3. The Clerk is directed to mail a copy of this Order to the Defendant at his last known address.

Dated this 22nd day of October, 2012.

BY THE COURT:

s/Laurie Smith Camp
Chief United States District Judge